(13)

NO. 85-732

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, et al.,

Appellees.

On Appeal from the Supreme Court of the State of South Dakota

APPELLEES' SUPPLEMENTAL BRIEF

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QUESTIONS DIRECTED BY THE COURT

1. Under 49 U.S.C. Section 1513(d)(3), the subsection "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." Is the question whether a state tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes," one of state or federal law?

2. If federal law governs the question whether a tax is an "in lieu tax" under section 1513(d)(3), is the South Dakota Airline Flight Property Tax, South Dakota Codified Laws Ch. 10-29, an "in lieu tax" under section 1513(d)(3)?

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APPELLEES' SUPPLEMENTAL BRIEF

ARGUMENT

The federal statute in question, 49 U.S.C. 1513(d) declares certain acts to unreasonably burden and discriminate against interstate commerce. These matters and the arguments relating to the definition of commercial and industrial property are in Appellees' original brief.

QUESTION NO. 1 DIRECTED BY THE COURT

1. UNDER 49 U.S.C. SECTION 1513 (d)(3), THE SUBSECTION "SHALL NOT APPLY TO ANY IN LIEU TAX WHICH IS WHOLLY UTILIZED FOR AIRPORT AND AERONAUTICAL PURPOSES." IS THE QUESTION WHETHER A STATE TAX IS AN "IN LIEU TAX WHICH IS WHOLLY UTILIZED FOR AIRPORT AND AERONAUTICAL PURPOSES," ONE OF STATE OR FEDERAL LAW?

GENERALLY

So far as applicable to the question here, it is the general rule that

when a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2. Sola Electric Co. v. Jefferson Electric Company, 317 U.S. 173, 174; 63 S.Ct. 172, 87 L.Ed. 165 (1942).

In that case this Court was called upon to decide whether a doctrine invoked in a lower court was so in conflict with the prohibition of a federal act that the Supreme Court could resolve the question even though its conclusion be contrary to that of a state court.

This Court held that where legal relationships must be deemed governed by federal law the benefit of a federal statute may not be denied by state statutes.

Appellees have not challenged the supremacy of §1513(d) prohibiting general taxation which is burdensome or discriminatory on the one hand but permitting within limits certain forms of taxation on the other hand.

A QUESTION OF FEDERAL LAW

In a case which involved a proviso similar to §1513(d)(3) this Court held that the validity of the tax defined by such proviso was a question of federal law.

In 1969 Congress had authorized states to tax national banks on a limited basis. Banks with principle offices in the taxing states could be subjected to any non-discriminatory tax generally applicable to state banks. However, no tax in effect prior

to January 1, 1973, could be imposed unless the state legislature authorized the same by subsequent "affirmative action". [1] That prohibition, however, did not apply to "any tax on tangible personal property". [2] The state of New York had a commercial rent tax prior to 1969. Subsequent thereto, the New York legislature increased the rate of tax.

The New York Court of Appeals concluded that under New York law, the commercial rent and occupancy tax was a tax on tangible personal property and hence not subject to the prohibitions of the savings

1 12 U.S.C. 548

2 The prohibition also did not apply to any license, registration, transfer, excise or other fee or tax imposed on the ownership, use of transfer of tangible personal property, imposed by a state which does not impose a tax, or an increased rate of tax, in lieu thereof.

clause. [3]

This Court PER CURIAM, held [4] that the commercial rent and occupancy tax was not considered by Congress to be a tax on tangible personal property. The court said at 440 U.S. 449,

> "Whether the tax at issue is a tax on tangible personal property within the meaning of Pub.L. 91-156 is a question of federal law;. . ."

§1513(d) provides a similar exception to a prohibition, i.e "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes."

SOME AIRLINE TAXES PREEMPTED

In a recent airline tax case this Court reviewed Hawaii's attempt to style a

3 Chase Manhattan Bank v. Finance Administration of the City of New York, 43 N.Y.2d 425, 431; 401 N.Y.S.2d 1002, 1004, 372 N.E.2d 789

4 Chase Manhattan Bank v. Finance Administration for the City of New York, 440 U.S. 447, 99 S.Ct. 1201, 59 L.Ed.2d 445, (1979)

gross receipts tax as a property tax measured by gross receipts and to avoid a Congressional prohibition against a ". . . tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . ." [5]

This Court in Aloha Airlines v. Director of Taxation, [6] looked through the title and style of the tax, viewed a federal question and stated:

> "The manner in which the state legislature has described and catagorized §239-6 cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines. . ." contrary to 49 U.S.C. 1513(a).

5 49 U.S.C. 1513(a)
6 464 U.S. 7, 104, S.Ct. 291, 78 L.Ed.2d 10 (1983)

The Court held that a state statute that imposes such a tax is therefore preempted. The court added [7] "Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce. . ."

In the case at bar, on the other hand §1513(d) only prohibits taxes on airlines which are discriminatory when compared to a particular class of property i.e. taxed commercial and industrial property.

§1513(d) does not apply to an in lieu tax wholly utilized for airport or aeronautical purposes. Appellees assert this clearly is a federal question.

QUESTION NO. 2 DIRECTED BY THE COURT

IF FEDERAL LAW GOVERNS THE QUESTION WHETHER A TAX IS AN "IN LIEU TAX" UNDER SECTION 1513(d)(3), IS THE SOUTH DAKOTA AIRLINE FLIGHT PROPERTY TAX, SOUTH

7 Note 10

DAKOTA CODIFIED LAWS CH. 10-29, AN "IN LIEU TAX" UNDER SECTION 1513(d)(3)?

As previously noted, South Dakota since statehood has taxed both real and personal property. Article XI, Section 2 of the State Constitution requires that taxes shall be uniform on property of the same class. Since situs property of airlines in South Dakota prior to 1961 was assessed by local assessors there is no record of what, if any, property was actually subjected to tax. However, the fact remains that the law of the state, SDCL 10-3-17, required that all persons and businesses self-list their personal property, thus the appellation commonly given this tax as the "liars tax".

Situs property continued to be assessed by local assessors until 1978 when, with the general repeal of the business inventory tax, the airlines received the same

benefit on locally assessed personal property enjoyed by the rest of the business community. [8]

To begin with, there is no question that the South Dakota Airline Flight Property Tax is utilized wholly for airport and aeronautical purposes. The statute itself, SDCL 10-29-15, makes this clear. [9] Thus the sole question is, "Is the South Dakota Airline Flight Property Tax an "in lieu" tax?"

With the exception of an income tax, South Dakota has been as resourceful as most other states in spreading the tax burden in a variety of ways. There have been taxes levied on grain and seed, honey beets, sugar cane, transient farmers as well as the more familiar franchise taxes on financial institutions; premiums tax on insurance

8 Ch. 72 and 73, Laws of 1978
9 Appellees' Original Brief, Appendix A, pg. 52.

companies and excise tax on construction contractors.

SOUTH DAKOTA'S MAIN TAX FOR STATE GOVERNMENT IS THE RETAIL SALES TAX

Specifically exempt from the states sales tax are the receipts from transportation services. [10] Those services join approximately seventy-five to one hundred enumerated businesses whose gross receipts are not taxable. Taxable against all users is motor fuel when used on the highways [11] and aviation fuel used in the state whether by private or public aircraft. [12] Not taxable is motor fuel used off the highways. [13] This would include airport vehicles when used only on runways for example. Only vehicles used on the public highways are subject to an

10 §10-45-12.1
11 §10-47-2
12 §10-47-65 - This tax is all used for aeronautical purposes.
13 §10-47-44

annual license fee. [14] Aircraft not used in air commerce is subject to an annual license fee as well as a one time registration charge. [15]

LOCAL GOVERNMENT RELIES ON PROPERTY TAX

The general revenue tax for local government in South Dakota is the property tax. Except for centrally assessed property [16] it is administered by local officials. Some municipalities have imposed local sales taxes but are bound by the state exemption laws. [17] Property which is centrally assessed by the state also contributes to the general revenue funds of the county, city and school district entities of government.

Centrally assessed property of utilities includes a unit assessment of both real and personal property of the company

14 §32-5-6
15 §50-11-12, 50-11-19 - commercial aircraft exempt 50-11-28
16 §10-28 to 10-38
17 §10-52-4

with one exception. Personal property of railroads is not assessed based upon South Dakota's understanding of the meaning of 49 U.S.C. 11503 and the interpretation of the "catch-all" clause of 49 U.S.C. 11503(b)(4). [18] All of the tax dollars generated by centrally assessed property other than airlines go into the general revenue of the local governments. Under state law all such assessments are equalized with the assessments made by local assessors. [19]

49 U.S.C. 1513(b) and 1513(d)(A), (B) and (C) address and identify taxes which serve the purpose of raising revenue for general government, state and local; property taxes, net income taxes, franchise taxes and

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18 Ogilvie v. State Board of Equalization, 657 F.2d 204 (Cert. den) 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed.2d 621 (1981)

19 Appellees' Initial Brief, pg. 38 to 43

sales and use taxes on the sale of goods and services.

By the amendment in the 1982 Tax Equity and Fiscal Responsibility Act, Section 532, the Congress specifically addressed discrimination in the ad valorem property tax field. [20]

Government should not be permitted to favor one business over another, where uniformity of taxation is mandated as it is in the South Dakota Constitution for ad valorem taxes [21] hence §1513(d)(A), (B), and (C) specifically prohibit certain tax practices when it comes to the general revenue laws.

IN LIEU TAXES PERMITTED

Realizing that not all states assess airlines for general revenue purposes

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20 U.S. Senate Committee on Commerce letter to President of Air Transport Association of America - Jurisdictional Statement, pg. 11a.

21 Article XI, Section 2

Appellees believe Congress added Subsection (d)(3) to permit tax other than a general revenue tax when that tax is utilized wholly for airport and aeronautical purposes.

The Airline Flight Property Tax in South Dakota is in lieu of that general revenue tax which other commercial and industrial property pays. No local governmental entity receives a penny of the Flight Property Tax for its general government operations. In 1978, when the South Dakota legislature repealed the personal property tax, it recognized the inherent difference between local assessments and centrally assessed property. Specifically the legislature provided in SDCL 10-4-6.1 that:

> "Personal property as defined in §10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax."

The legislature also limited any increase in the effective growth of centrally assessed taxes which might be considered on personal property by providing a maximum rate of growth for taxes imposed on the personal property of such utilities. [22] While centrally assessed property includes a valuation for the personalty of the particular business with the exception of railroads, that personalty can never be equalized at more than one hundred twenty-five percent of its 1978 valuation.

REPEAL OF PERSONAL PROPERTY TAX DID NOT IMPAIR AN IN LIEU TAX

It is the position of the Appellees that the recognition and adoption by the legislature in 1978, of a statute stating

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22 SDCL 10-6-34.1, App. A

that the repeal of business inventory taxes and the exemption of other personal property taxes shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax is ample recognition of the fact that the taxes which remained thereafter obviously were in lieu of those which were repealed.

Appellees appreciate the Court's decision to review a state Court's characterization of the tax as in the case of Wagner v. Covington, 251 U.S. 95, 40 S.Ct. 93, 64 L.Ed. 157 (1919),

> "When this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the tax as applied and enforced.

Appellees urge the Court to recognize that the practical effect and result is that no other tax is applicable to the business of this company as an interstate airline.

NO DENIAL OF EQUAL PROTECTION

This Court has recognized differences among states imposing business taxes and has long upheld a diversity of tax schemes against arguments of equal protection.

In the case of Lehnhausen v. Lake Shore Auto Parts Company, [23] this court discussed a tax scheme in Illinois very much like that in South Dakota where personal property taxes were lifted from the code and a variety of other measures left in place. A property tax on corporations was upheld after the people of the state exempted the property of individuals. Illinois of course, has an

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23 410 U.S. 356, 93 S.Ct. 1001 (1973)

income tax on corporations as opposed to no such levy in South Dakota.

South Dakota has imposed not a general revenue tax on airlines but a tax in lieu of a general tax; measured by certain use factors in the state and devoted solely to the airports which are utilized by the taxpaying airlines.

49 U.S.C. 1513(d) in Sections (A) (B) and (C) deal with characteristics of taxes used for general revenue purposes. §1513(d)(3) permits a tax which is to be used for airport and aeronautical purposes but not for the general use of the government. The South Dakota tax is just that; "in lieu" of the other tax impositions and dedicated to the support of the facilities used by the taxpayer.

CONCLUSION

If the South Dakota Airline Flight Property Tax is struck down airlines will pay

no tax for the business they do in this state. Although discrimination in taxation led Congress to preempt certain tax practices, it nevertheless recognized the unique nature of airlines and permitted limited taxation when the proceeds are dedicated for airport and aeronautical purposes. South Dakota's tax should be held by this Court to be such a tax.

Respectfully submitted,

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APPENDIX A

10-6-34.1. Centrally assessed property is hereby classified for purposes of ad valorem taxation and shall be assessed and equalized as real and personal property in the same proportion as was established in the respective taxing districts in the year 1977. Centrally assessed personal property shall be equalized at a percentage which is not greater than one hundred twenty-five percent of the percentage at which centrally assessed personal property was equalized in the respective taxing districts in 1977, but not to exceed the maximum percentage as provided in §10-6-33. Centrally assessed real property shall be assessed and equalized at the same percentage as other real property in the county.

Source: SL 1978, Ch 72, §14.